

Regulatory Kudzu

Anyone who has travelled in or visited the Southeastern US is likely to be familiar with kudzu, the ubiquitous climbing vine that seems to have swallowed large chunks of landscape, invading and conquering whole forests in an unstoppable march. Kudzu, a plant native to Japan and China, was introduced in the 1920s as forage, and during the dust bowl years of the 1930s to help control soil

publicized injuries and even death resulting from collapses or falling debris, NYC adopted laws to address the problem. The first of these was Local Law 10 adopted in 1980 requiring all buildings of more than six stories to be inspected every five years by a licensed engineer or architect and certified as safe. Serious deficiencies had to be corrected and the building given a second inspection.

or sheds before all work is done, including waiting to make sure follow-up inspections are not required. No building management or coop or condo board wants to have to incur the cost of reconstructing the scaffolding or sidewalk shed that had been removed prematurely. What we are left with are temporary structures not subject to the strict building codes for permanent construction that themselves become nuisances and hazards, as well as public eyesores.

As the streets get more crowded with “temporary” structures, as safety issues with these structures increases proportionally, and as the erector set providers get richer, the original safety purpose of the scaffolding gets further and further blurred and less appreciated as a legitimate concern. Kudzu was introduced to address serious issues – forage for livestock and later to help prevent soil erosion – and the evidence was that kudzu worked in both instances. But without proper conservation and control kudzu ran amok. Some would suggest that scaffolding and sidewalk sheds in the Big Apple – Urban Kudzu – have done the same.

So what does any of this have to do with the regulation of the business of insurance? For the past couple of summers I have done a tongue-in-cheek review of the proliferation of initializations and acronyms in the insurance world from the local state level to the National and International scenes: from state efforts to require Enterprise Risk Management (ERM) and Own Risk Solvency Assessments (ORSA) and other protocols on insurers; to the creation of new oversight bodies and protocols at the Federal level, including the Federal Insurance Office (FIO) and the Financial Stability Oversight Council (FSOC) with its Systematically Important Financial Institution (SIFI) designations; to International efforts including the European Union’s (EU) “prudential” regulatory regime, Solvency II, and the G-20’s Financial Stability Board (FSB) and the International Association of Insurance



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erosion. Without any natural predators, and with the warm moist climate conditions in the Southeast, kudzu appears to have gone wild over the countryside, engulfing thousands of acres of trees, shrubs, buildings or just about anything in its path.

Up here in Metropolitan New York we have our own version of kudzu – scaffolding! Like kudzu, scaffolding and its ground level sidekick, sidewalk sheds – seem to appear overnight without notice and also seem never to leave. Navigating the city streets without encountering this Urban Kudzu is practically impossible. As any denizen of Midtown Manhattan can attest, trying to walk from point A to point B without walking under scaffolding or through sidewalk sheds can be an almost impossible challenge (the reverse of this challenge is, of course, finding the route with the most sidewalk sheds in inclement weather).

Like kudzu, the proliferation of scaffolding and sidewalk sheds arose out of a legitimate issue of regulatory concern – debris falling from aging, ill-maintained high-rise buildings. After several well-

However, facade inspections under Local Law 10 did not have to be done from a scaffold—they could be done as a “visual inspection” from nearby, with binoculars or even a telescope. The real bonanza for scaffolding providers came with the adoption of Local Law 11 in 1998, which expanded the scope of buildings subject to inspections and, more importantly, eliminated the remote “visual inspection” option. Under Local Law 11 the physical inspection has to consist of at least one drop from a scaffold or other observation platform. No longer could buildings avoid scaffolding and sidewalk sheds, and the onslaught of Urban Kudzu was on!

But the local laws were not the only factors contributing to the ubiquitous scaffolding phenomenon. The pricing structure imposed by the scaffolding providers – the erector set builders – also contributed to the problem. The major cost to a building requiring scaffolding or sidewalk sheds for its Local Law 11 inspection or repairs is in the original construction and final dismantling. Rental fees for the completed structure are relatively minimal, so there is little incentive to remove any scaffolding

continued on page 10

Supervisors' (IAIS) Basic Capital Requirements (BCR) for its own class of G-SIIs (Global Systematically Important Insurers). The depth and complexity of these various initiatives is daunting, and unless you are subject to their requirements or advising those who are, or you just love reading phone books or the Internal Revenue Code, you might want to think twice about jumping into their specifics.

Even at the state level, how much of the NAIC actions are borne from efforts to avoid Federal pre-emption rather than from an actual or compelling regulatory need? How much of what the FIO and the FSOC are doing is motivated from a need to demonstrate strong action to eliminate future regulatory failures even with a lack of evidence that the existing regulatory structure contributed to prior collapses? And how much of the international efforts to establish worldwide bank-centric financial standards have anything to do with the

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To be effective regulation has to address a legitimate need, and the solution must match the need as closely as possible. A proliferation of duplicative, excessive regulations all addressing the same issue – such as insurance company solvency – will only lead to a landscape overwhelmed with stifling controls that serve neither the underlying concern nor the strength and viability of the industry. Obscured by this jungle of jurisdictional rivalry among the state, federal and international competing regulatory bodies are the underlying regulatory concerns – real or imagined.

Regulatory Kudzu rules! [A]

Peter Bickford has over four decades of experience in the insurance and reinsurance business, with particular focus on regulatory, solvency, agency, alternative market and dispute resolution issues. In addition to his experience as a practicing attorney, he has been an executive officer of both a life insurance company and of a property/casualty insurance and reinsurance facility. A complete biography for Mr. Bickford may be accessed at www.pbnylaw.com.

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